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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL MERCADO et al.,

Defendants and Appellants.

D055138

(Super. Ct. No. RIF117696)

APPEALS from judgments of the Superior Court of Riverside County,
J. Thompson Hanks, Judge. Affirmed in part, reversed in part, and remanded with
directions.

INTRODUCTION

A jury convicted David Henry Schumm and Manuel Mercado of robbery (Penal Code,¹ § 211; count 1), carjacking (§ 215, subd. (a); count 2), false imprisonment (§ 236; count 4), witness intimidation (§ 136.1, subd. (b)(1); count 5), and active participation in a criminal street gang (§ 186.22, subd. (a); count 6). The jury also convicted Schumm of

¹ Further statutory references are to the Penal Code unless otherwise specified.

being a felon in possession of a firearm (§ 12021, sub. (a)(1); count 3). As to counts 1 and 2, the jury found true allegations Schumm and Mercado were both principals and at least one of them personally used a firearm (§§ 12022.53, subd (b), (e)). As to these counts, the jury also found true allegations Schumm intentionally and personally used a firearm (§§ 12022.53, subd. (b), 1192.7, subd. (c)(8)). As to counts 1 through 5, the jury found true criminal street gang enhancement allegations (§ 186.22, subd. (b)). In addition, Schumm admitted having two prior prison convictions (§ 667.5, subd. (b)) and Mercado admitted having three prior prison convictions (§ 667.5, subd. (b)), three prior serious felony convictions (§ 667, subd. (a)(1)), and three prior strike convictions (§ 667, subds. (c), (e)).

The trial court sentenced Schumm to 42 years 4 months to life in prison, consisting of 15 years to life for count 2 plus 3 years 4 months for the associated personal firearm use enhancement, and 4 years for count 1 plus 10 years for the associated personal firearm use enhancement and 10 years for the associated criminal street gang enhancement. The trial court imposed concurrent sentences for the remaining counts and enhancements.²

The trial court sentenced Mercado to 45 years to life in prison, consisting of 25 years to life for count 1 plus 10 years to life for the associated firearm use enhancement

² The abstract of judgment indicates the trial court stayed imposition of sentence for Schumm's prior prison convictions although the court did not address these convictions on the record at the sentencing hearing. At oral argument, the Attorney General conceded the court should have stricken them, rather than stayed imposition of sentence for them.

and 10 years to life for the associated criminal street gang enhancement. The court imposed concurrent sentences for counts 2, 5, and 6 and their associated enhancements. The court stayed imposition of sentence for count 4 and for Mercado's prior prison convictions.³ The court imposed sentences of five years for each of Mercado's three prior serious felony convictions. The court minutes and the abstract of judgment indicate the sentences for these prior convictions were to run concurrent with Mercado's other sentences; however, the court did not state this on the record at the sentencing hearing.⁴

Schumm and Mercado both appeal, raising numerous claims of trial court error. We remand the matter back to the trial court to amend the abstract of judgments to correct sentencing errors. In all other respects, we affirm the judgments.

I

FACTUAL BACKGROUND

Shane Harper drove his truck to Lynn Frias's house and pulled into the driveway behind a blue car. He went there looking for Mercado, whom he had met there the previous day, to see whether Mercado had located an in-dash DVD player for him to purchase. A black car carrying Schumm, Mercado, and a third unidentified male pulled up to the house after him. Harper turned off the truck and was getting out of it when Schumm approached Harper and pointed a chrome pistol at his chest. Harper "freaked

³ The Attorney General conceded at oral argument the court should have stricken rather than stayed imposition of sentence for the prison priors (fn.2, *ante*).

⁴ The abstract of judgment contains incorrect Penal Code references for these convictions.

out." Schumm told him to calm down or Schumm would "cap" him. Schumm told him to get out of the truck. The lights from the truck's alarm were flashing and Schumm asked for the keys to the truck. Harper explained he bobbled the keys when Schumm approached him and they were on the ground. Schumm picked up the keys and told Harper to go into the garage, which was open. As Harper walked up to the garage, Frias came out of the house. Harper initially refused to go into the garage because it was dark, there was a sheet hanging up inside, and Schumm had a gun. After someone turned on the light, he went inside and stood on the other side of the sheet with Frias, Schumm, Mercado and the unidentified male.

Schumm asked Harper if he had any money and told him to empty his pockets. Harper emptied his pockets and gave \$90 to Schumm. Schumm asked for Harper's wallet and Harper told him it was in the truck. Schumm went out to the truck to get the wallet, but he could not find it. Harper retrieved the wallet, which had a \$100 bill inside.

When they returned to the garage, Schumm took the \$100 bill and then told Harper he was going to take the truck. Up to that point, Harper thought Schumm only wanted money. Harper became upset. He told Schumm that Schumm could not have the truck because he needed it to get to work in the morning. Schumm assured Harper he just needed to borrow the truck and the money and Harper would get them back. Frias also assured Harper he would get his money and his truck back. Because Schumm's gun was visible during the encounter, Harper felt he had no choice in the matter.

Schumm told Harper to wait in the garage for him. He also sought Harper's assurance Harper would not call the police. Harper agreed not to call the police in part because he feared retaliation if he did so.

Schumm left in the truck and Harper returned to the garage with Mercado and the unidentified male. While in the garage, Harper paced back and forth anxiously and questioned why this was happening to him. He was told to relax and was assured he would get his truck back if he just waited. He did not feel free to leave because he was told to stay there, the incident intimidated and frightened him, he had no means to leave, and he thought he would get his truck back if he cooperated. In addition, at one point he tried to walk out of the garage and Mercado told him to get back inside. He assured Mercado and the unidentified male he was not going to call the police.

At some point, Harper obtained permission to sit inside the blue car parked in the driveway and he fell asleep there. When he awoke in the early morning, he was alone and ran to a friend's house nearby.

Later that morning, Schumm gave the truck keys to Frias, who returned them to Harper. She told Harper she did not know the location of the truck, but was told it was down the street. Harper looked around the area for the truck, but never found it. Several days later, a police officer from another jurisdiction located the truck less than a half mile from Schumm's residence. The truck's engine, undercarriage, and interior had been damaged and the stereo system had been taken.

Two days later, Harper reported the incident to the sheriff's department. A sheriff's deputy went to a motel where Harper was staying and interviewed him. The

deputy found Harper to be extremely nervous and scared. Harper described Schumm, Schumm's gun, Mercado, and the unidentified male. In addition, he described Frias's house and garage, including gang writing on the garage walls. He also provided the deputy with the men's monikers. The three men did not refer to themselves by their monikers during the incident. Instead, Harper learned Mercado's moniker, Psycho, from their prior encounter and learned Schumm's moniker, Wicked, and the unidentified male's moniker, Clever, from third party sources.⁵

During a subsequent interview at the sheriff's station, Harper identified Schumm and Mercado in photographic lineups. He also identified the gun used by Schumm from a photo array. However, when asked to make an in-court identification during the trial, Harper testified he did not recognize either Schumm or Mercado.

Harper told the deputy there was no doubt in his mind he would have been shot if he had not done what Schumm wanted. He also told the deputy that, based on the demeanor and body language of Mercado and the unidentified male, he knew he was not free to leave the garage. He confirmed this when he tried to walk out of the garage and the two men stopped him and Mercado told him to get back in the garage. He believed he would have been harmed if he did not stay in the garage. Harper told the deputy he did not want anyone to be prosecuted, he just wanted the truck back. He believed

⁵ Frias's brother, Daniel Vavua, is known by the moniker, Clever. Sheriff's deputies determined Vavua could not have been present during the incident because he was incarcerated in state prison at the time.

Schumm, Mercado, and the unidentified male were gang members and he feared retaliation if the police were involved.

Sheriff's deputies went to Frias's home and took photographs of the gang writing on the garage wall. The deputies also found a CD album with gang writing in it. Both writings included Schumm's moniker.

The deputies later interviewed Frias at the sheriff's station. She told the deputies Harper went to her home looking to purchase some marijuana. Harper gave the money and truck to Schumm for this purpose. When Schumm did not return, Harper started getting upset. He was feeling the effects of other drugs he had taken and was acting paranoid. Mercado came to her house, picked her up, and the two of them looked for Harper's truck, but could not find it. The deputies accused Frias of lying to them. At the close of the interview, she agreed to tell them the whole truth, but wanted to discuss the matter with her mother first. The deputies were unable to arrange another interview with her.

At trial, Frias testified⁶ Harper had loaned his truck to Schumm so Schumm could buy some drugs. She waited with Harper near the entrance of the garage and, after a while, he started getting upset and acting strangely. Mercado came by and she left with him to get some beer. When they returned, they drank beer with Harper. They left again to look for Schumm and to look for drugs to buy. Unsuccessful in their efforts, they returned again. Harper was still upset, so she had a friend pick her up and left once

⁶ Frias was taken into custody to secure her trial testimony because she failed to appear in response to a subpoena.

again. Mercado also left. After she returned home the next morning, Harper came by looking for his truck. Later that day, Schumm gave her Harper's keys and she returned them to Harper. After the incident, she painted over the garage walls. She admitted that she had not been truthful during her interview with the sheriff's deputies, but could not recall specifically what she lied about.

During her incarceration, she sent Harper a letter apologizing "for not being a better friend when all this went down" and stating she "was protecting both of us by not calling the police." She also asked Harper to assist her with her parole violation hearing by providing a notarized statement indicating that the only thing she "did wrong was keep quiet and not call the police." At trial, she repeatedly denied writing the letter herself or supplying any of its contents.

A few days after the crimes against Harper, a sheriff's deputy arrested Schumm on an unrelated matter. Another deputy discovered a loaded .25 caliber chrome handgun in Schumm's car.

A gang expert opined Schumm and Mercado were active members of the Mira Loma Dodd Street gang. They had both admitted belonging to the gang and they had gang tattoos and monikers evidencing their membership. In addition, at the time of his arrest in this case, Mercado was in the company of another known member of the gang. Mercado had also been seen in that person's company and in the company of other members of the gang in the three-month period before his arrest. Moreover, during a search of Mercado's home in 1996, deputies found gang writings as well as a gun and body armor belonging to Mercado.

The gang expert described the gang's origins, turf, common signs or symbols, and objective of instilling fear into the surrounding community. The expert further testified the gang's primary activities include committing homicides, robberies, assaults with deadly weapons, shootings, car thefts, and drug sales. The parties stipulated three members of the gang had been convicted of attempted murder, burglary, assault with a firearm, and active participation in a criminal street gang. The expert testified that crimes, in general, benefit a gang by building its reputation for ruthlessness and causing other gangs and the community to fear it. Offenses like carjacking, robbery, false imprisonment, and witness intimidation benefit a gang by increasing the gang's reputation for having the toughest members. The theft of a vehicle, such as Harper's truck, benefits a gang by providing the gang with a vehicle to commit crimes without the vehicle leading back to the gang.

II

DISCUSSION

A. *Punishment for both carjacking and robbery permissible under section 654*⁷

Schumm contends the trial court's imposition of sentences for both his carjacking conviction and his robbery conviction violates the proscription against multiple punishments in section 654. We disagree.

⁷ The People note in their brief that Schumm did not raise this issue below. Because a sentence imposed in violation of section 654 is an unauthorized sentence, failure to raise the issue below does not result in a forfeiture of the issue on appeal. (*People v. Le* (2006) 136 Cal.App.4th 925, 931.)

"[Section 654] prohibits the imposition of punishment for more than one violation arising out of an 'act or omission' which is made punishable in different ways by different statutory provisions." (*People v. Beamon* (1973) 8 Cal.3d 625, 636.) Section 654 applies " 'not only where there was but one 'act' in the ordinary sense . . . but also where a course of conduct violated more than one statute . . . within the meaning of section 654." [Citation.] " (*People v. Beamon*, at p. 637.) "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) "If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) We review a trial court's finding that a defendant is subject to multiple punishment for substantial evidence. (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 935.)

Here, there is substantial evidence Schumm had at least two separate criminal objectives during his encounter with Harper: taking Harper's truck and taking his money. Had Schumm only intended to take Harper's truck, he could have done so as soon as he confronted Harper. Had he only intended to take Harper's money, he could have left Frias's home after Harper gave him the money from his pocket or after Harper gave him

the money from his wallet. The fact that Schumm may have held these criminal objectives simultaneously does not preclude multiple punishment. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1212, 1216.)

Schumm's reliance on *People v. Bauer* (1969) 1 Cal.3d 368 (*Bauer*) is misplaced. In *Bauer*, the defendant and accomplice robbed three elderly women. During the course of the robbery, the two men carried their loot to the garage and then drove away in one victim's car. A jury subsequently convicted the defendant of, among other crimes, robbery and auto theft. The trial court imposed sentences for both offenses. (*Id.* at pp. 371-372.) The California Supreme Court concluded section 654 precluded multiple punishment in this instance because the auto theft was indivisible from the robbery. (*Id.* at pp. 376-377.) The court's conclusion is consistent with the well-settled rule that if one offense is the means of perpetrating or facilitating another offense, the offenses are indivisible under section 654 and the trial court may only punish the defendant for the most serious offense. (*People v. Britt* (2004) 32 Cal.4th 944, 951; *People v. Latimer*, *supra*, 5 Cal.4th at pp. 1216-1217; *People v. Harrison*, *supra*, 48 Cal.3d at p. 335; *Neal v. State of California*, *supra*, 55 Cal.2d at p. 20.) In this case, Schumm, unlike the defendant in *Bauer*, did not use Harper's truck as a means of taking Harper's money or vice versa. Accordingly, *Bauer*, does not preclude a finding the two offenses are divisible and are both punishable under section 654.

B. *Evidence sufficient to support conviction for active participation in a criminal street gang and criminal street gang enhancement allegations*

Schumm contends there is insufficient evidence to support his conviction under section 186.22, subdivision (a), for active participation in a criminal street gang. In addition, both Schumm and Mercado contend there is insufficient evidence to support the true findings on the criminal street gang enhancement allegations under section 186.22, subdivision (b)(1).

1. Standard of review

"In reviewing a sufficiency of evidence claim, the reviewing court's role is a limited one. 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" ' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738-739; accord, *People v. Leon* (2008) 161 Cal.App.4th 149, 161.)

2. Elements of offense and enhancement

To establish a violation of section 186.22, subdivision (a), the prosecution must prove three elements. "Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element. . . . The second element is 'knowledge that [the gang's] members engage in or have engaged in a pattern of criminal gang activity,' and the third element is that the person 'willfully promotes,

further, or assists in any felonious criminal conduct by members of that gang.'

[Citation.]" (*People v. Lamas* (2007) 42 Cal.4th 516, 523.)

To establish the truth of a criminal street gang enhancement allegation under section 186.22, subdivision (b)(1), "the prosecution must prove that the crime for which the defendant was convicted had been 'committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.' [Citation.]" (*People v. Gardeley* (1996) 14 Cal.4th 605, 616-617; accord *People v. Williams* (2009) 170 Cal.App.4th 587, 625.) The prosecution may meet its burden by presenting testimony from a gang expert. (*Gardeley, supra*, 14 Cal.4th at pp. 617-620; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.)

3. Evidence supporting conviction for offense

A gang expert familiar with the Mira Loma Dodd Street gang opined Schumm was an active participant. The expert based his opinion on Schumm's admissions to being a gang member and to having the moniker, Wicked. These admissions occurred both before and after the crimes against Harper. The expert also based his opinion on Schumm's numerous gang tattoos, his prior arrest in the company of a gang member, and his ongoing criminal activity. This evidence provides substantial support for the jury's implied finding Schumm's participation in the gang was more than nominal or passive.

In addition, there is substantial support for the jury's implied finding Schumm knew the gang's members engage in or have engaged in a pattern of criminal activity. The gang expert testified gang members typically hang out with one another and, by

necessity, must know one another. According to the expert, the gang once had up to 250 active members, but had fewer than 30 members at the time the crimes against Harper occurred because most of the other members were incarcerated. The expert further testified Schumm had previously been arrested in the company of another gang member for an offense typical of those among the gang's primary activities.

There is also substantial evidence to support the jury's implied finding Schumm willfully promoted, furthered, or assisted in felonious criminal conduct by the gang's members. Schumm's crimes against Harper are typical of those among the gang's primary activities and Schumm committed the crimes in the presence of and with the assistance of at least one other gang member. The crimes occurred within the gang's territory at a location associated with Schumm's gang persona. The crimes engendered fear, which the gang expert testified is one of the key objectives of the gang's primary activities. As there is substantial evidence to support each element of the offense of active participation in a criminal street gang, we conclude there is substantial evidence to support Schumm's conviction for this offense.

4. Evidence supporting enhancement

For similar reasons, we conclude there is substantial evidence to support the criminal street gang enhancement allegations. The gang expert opined that both Schumm and Mercado are members of the gang. The crimes committed against Harper are typical of those among the gang's primary activities. Schumm and Mercado committed the crimes within the gang's territory at a location where they are known by their gang personas. Moreover, the crimes were committed in a manner to engender fear and earn

"respect" for the gang as well as for Schumm and Mercado. The jury could have reasonably inferred from this evidence that Schumm and Mercado committed the crimes in association with the gang and with the specific intent to promote, further, or assist in criminal conduct by gang members. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1197-1199 (*Morales*); *Leon, supra*, 161 Cal.App.4th at p. 163.)

C. *Evidence to support false imprisonment conviction*

Schumm and Mercado contend there is insufficient evidence to support their felony false imprisonment convictions. "False imprisonment is the unlawful violation of the personal liberty of another." [Citations.] In this context, "[p]ersonal liberty" is violated when 'the victim is "compelled to remain where he does not wish to remain, or to go where he does not wish to go."' [Citations.] It is the restraint of a person's freedom of movement that is at the heart of the offense of false imprisonment embodied in section 237. [Citation.] "'The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both'" [Citations.]" (*People v. Reed* (2000) 78 Cal.App.4th 274, 280.)

False imprisonment is a misdemeanor if it is achieved with "no force beyond that necessary to restrain the victim." (*People v. Babich* (1993) 14 Cal.App.4th 801, 806 (*Babich*)). False imprisonment is a felony if it is achieved "by violence, menace, fraud, or deceit" [Citations.]" (*People v. Reed, supra*, 78 Cal.App.4th at p. 280.) The trial court instructed the jury on both the violence and menace theories. Schumm and Mercado contend there is insufficient evidence to support either theory. We conclude

there is sufficient evidence to support the menace theory and, therefore, do not address the sufficiency of the evidence to support the violence theory.

" 'Menace' is defined as ' " 'a threat of harm express or implied by word or act.' " ' [Citation.]" (*People v. Reed, supra*, 78 Cal.App.4th at p. 280; accord, *People v. Wardell* (2008) 162 Cal.App.4th 1484, 1490.) In this case, the evidence shows Schumm intercepted Harper as he was getting out of his truck, pointed a gun to his chest, and told him to go into the garage. After taking Harper's truck and money, Schumm told Harper to remain in the garage and not to call the police. The gun was visible the whole time and Mercado and the other unidentified male stood by as these events occurred, inferably as a show of strength and support. Then, after Schumm left with Harper's truck and money, Mercado and the other unidentified male stayed behind inferably to guard Harper and assure Harper did not call the police. When Harper tried to leave the garage to get fresh air, Mercado and the unidentified male followed him and Mercado directed him back into the garage. We conclude the jury could reasonably find from this evidence that Schumm's and Mercado's acts and words expressly or impliedly threatened harm to Harper. (*People v. Wardell* (2008) 162 Cal.App.4th 1484, 1491; see also, *People v. Henderson* (1977) 19 Cal.3d 86, 97, overruled on another point in *People v. Flood* (1998) 18 Cal.4th 470, 484, 490 & fn. 12.)

People v. Matian (1995) 35 Cal.App.4th 480 (*Matian*), upon which both Schumm and Mercado rely, is inapposite. In *Matian*, the defendant sexually assaulted the victim. During the assaults, the defendant squeezed the victim's breast hard enough to cause her pain and possible bruising. After the assaults, she tried to leave, but the defendant

grabbed her arm and yelled at her not to go. He yelled at her "nothing happened" and told her to wash her face. She retreated to a chair and the defendant went to a nearby office where he could see her. Each time she got up from the chair, the defendant glared at her and got up out of his chair to approach her. (*Id.* at p. 485.) The *Matian* court concluded this evidence was insufficient to support a conviction for felony false imprisonment because there was no evidence the defendant used a deadly weapon and, apart from the earlier sexual assaults, there was no evidence the defendant verbally threatened the victim or made threatening movements. (*Id.* at pp. 486-487.)

We could not locate any published appellate court opinion agreeing with the *Matian* court's conclusion, but found several criticizing it. (*People v. Wardell, supra*, 162 Cal.App.4th at p. 1491, *People v. Aispuro* (2007) 157 Cal.App.4th 1509, 1513; *People v. Castro* (2006) 138 Cal.App.4th 137, 143.) Moreover, in this case, unlike in *Matian*, Schumm (as the perpetrator) and Mercado (as an aider and abettor) used a gun to get Harper into the garage and to get him to remain there. Also unlike in *Matian*, when Harper attempted to leave, Mercado did more than just glare at him. Mercado went after him and told him to get back into the garage. Accordingly, *Matian* does not support a conclusion there was insufficient evidence of menace in this case.

D. *No requirement to give misdemeanor false imprisonment instruction sua sponte*

Mercado contends the trial court erred in failing to sua sponte instruct the jury as to the crime of misdemeanor false imprisonment. Misdemeanor false imprisonment is a lesser included offense of felony false imprisonment. (*Babich, supra*, 14 Cal.App.4th at p. 807.) A trial court must instruct sua sponte on a lesser included offense "when the

evidence would justify a jury in acquitting on the greater offense, but convicting on the lesser." (*Ibid.*) Accordingly, resolution of Mercado's contention turns on whether the evidence would have justified a jury finding that Mercado unlawfully restrained Harper, but did so without menace. (*Ibid.*) We conclude the evidence would not have justified such a finding.

As discussed above, the evidence in this case shows Schumm (as the perpetrator) and Mercado (as an aider and abettor) restrained Harper by using a gun to threaten and intimidate him. The use of a gun is plainly force "beyond that necessary to restrain the victim." (*Babich, supra*, 14 Cal.App.4th at p. 806.) Accordingly, the trial court had no duty to sua sponte instruct the jury on misdemeanor false imprisonment.

E. *Sufficient evidence to support witness intimidation conviction*

Schumm contends there is insufficient evidence to support his witness intimidation conviction. "Section 136.1, subdivision (b)(1), criminalizes trying to dissuade a victim from reporting a crime." (*People v. Upsher* (2007) 155 Cal.App.4th 1311, 1320.) "To prove a violation of section 136.1, subdivision (b)(1), the prosecution must show (1) the defendant has attempted to prevent or dissuade a person (2) who is a victim or witness to a crime (3) from making any report of their victimization to any peace officer or other designated officials." (*Ibid.*)

Here, the evidence indicates Schumm took Harper's truck and money at gunpoint. Then, with the gun in view, Schumm directed Harper not to call the police and left him in the company of Mercado and another man, who were inferably guarding Harper to ensure

he complied with the directive. We conclude such evidence amply supports Schumm's conviction for witness intimidation.

F. *No error admitting portions of Frias interview tape*

After Frias's trial testimony, both the prosecution and defense wanted to play the tape of Frias's interview with the two sheriff's deputies. However, Schumm's counsel objected to the jury hearing certain portions of the tape where the deputies were "just talking" about "the law and what their ideas are." Schumm's counsel argued these portions of the tape were irrelevant, speculative, and inadmissible under Evidence Code section 352. The trial court overruled the objections because the portions of the tape Schumm's counsel sought to exclude provided context for the portions of the tape Schumm's counsel wanted admitted. On appeal, Schumm contends the trial court prejudicially erred by refusing to exclude the challenged portions of the tape because the deputies' remarks in those portions of the tape included allegations Frias was lying as well as opinions about Schumm's guilt and the strength of the gun evidence against him.

Preliminarily, the People contend Schumm forfeited his claim that the trial court erred in admitting the portions of the tape in which the sheriff's deputies accused Frias of lying because he did not object on this basis below. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353.) The objection must "fairly inform the trial court, as well as the party offering the evidence, of

the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.) "If the court overrules the objection, the objecting party may argue on appeal that the evidence should have been excluded for the reason asserted at trial, but it may not argue on appeal that the court should have excluded the evidence for a reason different from the one stated at trial. A party cannot argue the court erred in failing to conduct an analysis it was not asked to conduct." (*People v. Partida, supra*, 37 Cal.4th at p. 435.)

In this case, the record does not show Schumm's objections fairly informed the trial court he had concerns about playing the portions of the tape where sheriff's deputies accused Frias of lying to them. Moreover, the record shows both Schumm and Mercado wanted the portions of the tape played where it appeared the sheriff's deputies were pressuring Frias to conform her testimony to their expectations. This implicitly includes the portions where they accused her of lying to them.⁸ Therefore, we agree Schumm has forfeited any claim of prejudice from the trial court's admission of these portions of the tape.

Regarding Schumm's claim the trial court erred in admitting the portions of the tape reflecting the sheriff's deputies' opinions about Schumm's guilt and the strength of the evidence against him, we review the trial court's ruling for abuse of discretion. (*People v. Parrish* (2007) 152 Cal.App.4th 263, 274.) Evidence Code section 356

⁸ During the prosecution's direct examination of her, Frias admitted she lied to the deputies during the interview.

provides in part, "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; . . . and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. 'In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have *some bearing upon, or connection with*, the admission or declaration in evidence. . . .' [Citations.]" (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1174; accord, *People v. Harris* (2005) 37 Cal.4th 310, 334-335; *People v. Parrish*, *supra*, 152 Cal.App.4th at p. 274.)

In this case, it is apparent from the tape transcript that the challenged portions of the tape bear upon, are connected with, and provide context for the portions Schumm wanted admitted. Schumm does not argue to the contrary. Accordingly, we conclude he has not established the trial court abused its discretion in admitting the challenged portions under Evidence Code section 356. As he has not established an abuse of discretion, we do not address his argument that the admission of the challenged portions of the tape prejudiced him.

G. *Declining invitation to vacate Mercado's prior strike conviction findings not error*

Mercado contends the trial court abused its discretion in declining to vacate his prior strike conviction findings in furtherance of justice under section 1385. In determining whether to vacate a prior strike conviction finding under section 1385, the trial court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [three strikes law's] spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A trial court does not abuse its discretion in declining to vacate a prior strike conviction finding unless the trial court's decision is so irrational or arbitrary that no reasonable person could agree with it. (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Where the record shows that the trial court balanced the relevant factors and reached an impartial decision conforming to the spirit of the law, we will affirm the trial court's ruling, even if we might have ruled differently. (*Id.* at p. 378.)

Here, the record indicates the court considered Mercado's briefing and his counsel's arguments discussing the relevant factors for determining whether to vacate a prior strike conviction finding. Implicitly finding Mercado fell within the spirit of the three strikes law, the trial court declined to vacate his prior strike conviction findings because he committed his prior strike crimes close together and he had only been out of prison a couple of years before committing the offenses against Harper. The trial court's

decision is not so irrational or arbitrary that no reasonable person could agree with it. Therefore, we conclude the trial court did not abuse its discretion in declining to vacate Mercado's prior strike conviction findings.⁹

H. *Errors in Mercado's sentence require remand for correction*

The parties agree the trial court erroneously failed to stay the sentence for the criminal street gang enhancement associated with Mercado's robbery conviction. (§ 12022.53, subd. (e)(2); *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126-1130; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1282). In addition, the Attorney General contends the abstract of judgment and the trial court's minutes do not reflect proper sentences for Mercado's three prior serious felony convictions. Specifically, the abstract of judgment and the minutes reflect the imposition of concurrent sentences for these convictions and the Attorney General contends the trial court was required to impose consecutive sentences.

Mercado concedes the trial court is required to impose consecutive sentences for serious felony prior convictions. However, he contends the trial court could not impose a sentence for one of his serious felony convictions because it was brought and tried at the same time as another one. We agree.

⁹ In a single sentence at the end of his opening brief, Mercado argues his sentence violates his due process rights and the ban on cruel and unusual punishment. We need not consider perfunctorily asserted arguments. (*People v. Weaver* (2001) 26 Cal.4th 876, 986-987; *People v. Mayfield* (1993) 5 Cal.4th 142, 196; see also, *People v. Schmeck* (2005) 37 Cal.4th 240, 303 [to fairly present and preserve a claim for federal court review that has previously been rejected in state court, defendant must (i) identify the claim in the context of the facts, (ii) note that the same or similar claim has previously been rejected, and, if permissible, (iii) ask the court to reconsider the claim].)

Section 667, subdivision (a)(1) provides in part, "any person convicted of a serious felony who previously has been convicted of a serious felony . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively." "[T]he requirement in section 667 that the predicate charges must have been 'brought and tried separately' demands that the underlying proceedings must have been formally distinct, from filing to adjudication of guilt." (*In re Harris* (1989) 49 Cal.3d 131, 136; accord, *People v. Wiley* (1995) 9 Cal.4th 580, 585.)

Mercado's three serious felony prior convictions were a 1999 conviction for being a felon in possession of a firearm with a gang enhancement, a 1999 conviction for being a felon in possession of ammunition with a gang enhancement, and a 1998 conviction for active gang participation. The record shows the 1999 convictions occurred in the same case on the same date. Therefore, the 1999 convictions were not brought and tried separately and the trial court could not impose sentences for both of them.

III

DISPOSITION

As to Schumm, the matter is remanded to the superior court to amend the abstract of judgment to strike his prior prison convictions. As to Mercado, the matter is remanded to the superior court to amend the abstract of judgment to stay the criminal street gang enhancement associated with the robbery conviction, to impose consecutive sentences for his 1998 prior serious felony conviction enhancement and one of his 1999 prior serious

felony conviction enhancements, and to strike Mercado's prior prison convictions. After the superior court has amended the abstract of judgments, it is directed to forward copies of them to the Department of Corrections and Rehabilitation. In all other respects the judgments are affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

AARON, J.